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Eddy ak Ganeng v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(IM)-272–06 OF 2019
KAMALUDIN MD SAID, RAVINTHRAN AND DARRYL GOON JJCA
31 MARCH 2022

C *Evidence — Prima facie case — Establishing of prima facie case — Appellant appealed against conviction for murder — Whether death was caused by act of accused — Whether deceased died from gunshot wound — Whether there was a deliberate act evincing an intention to murder — Whether prima facie case proven — Whether conviction safe — Penal Code ss 300(c) & 302*

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The appellant was arrested when he surrendered himself at the police station. The police seized a shotgun pellet, four live bullets and a waist pouch from the appellant. The appellant was then charged in the High Court under s 302 of the Penal Code ('the PC') for causing the death of the deceased ('victim'). The E appellant was subsequently found guilty of the charge and the judicial commissioner ('JC') convicted and sentenced the appellant to death. The appellant, being dissatisfied with the conviction, appealed on the ground, inter alia, that the death or injury of the deceased was not caused by the result of the F act of the appellant for the reason that: (a) the shotgun (exh P12A) was not the murder weapon; (b) the expended cartridge (exh P13A) was not the actual expended cartridge used in the shooting of the deceased; (c) no gunshot residue ('GSR') or gunpowder residue was found on the appellant to prove that he fired any gun; and (d) PW6 did not see the appellant shoot the deceased. The main G issue that arose for determination on appeal was whether the prosecution had proved a prima facie case on the charge of murder against the appellant.

Held, dismissing the appeal:

H (1) The court was satisfied that a prima facie case was proven against the appellant. Intention or mens rea was not something capable of being established by direct evidence; it was a matter of inference. It could be gathered from all the facts and circumstances prevailing in the case. The fatal wound was inflicted on the chest area which was a vital part of the body. The appellant had used a shotgun which was a lethal weapon, fired I at close range at a vital part of the body. These were deliberate acts evincing an intention which satisfied the subjective test required in s 300(c) of the PC. Also, the death was an imminent natural consequence of the injury inflicted by the appellant. Having found a prima facie case proven against the appellant to the charge of murder, and since the

appellant having understood the options available to him, elected to remain silent, the JC correctly convicted and sentenced the appellant (see paras 33, 35–37 & 39).

[Bahasa Malaysia summary

Perayu telah ditahan apabila beliau menyerah diri di balai polis. Polis telah merampas sebutir senapang patah, empat peluru hidup dan kantung pinggang daripada perayu. Perayu kemudiannya didakwa di Mahkamah Tinggi di bawah s 302 Kanun Keseksaan ('KK') kerana menyebabkan kematian si mati ('mangsa'). Perayu kemudiannya didapati bersalah atas pertuduhan tersebut dan pesuruhjaya kehakiman ('PK') mensabitkan kesalahan dan menjatuhkan hukuman mati kepada perayu. Perayu, tidak berpuas hati dengan sabitan, merayu atas alasan, antara lain, bahawa kematian atau kecederaan si mati bukan disebabkan oleh hasil perbuatan perayu atas sebab: (a) senapang patah (exh P12A) dan bukan senjata pembunuhan; (b) kelongsong yang digunakan (exh P13A) bukanlah kelongsong sebenar yang digunakan untuk menembak si mati; (c) tiada sisa tembakan ('GSR') atau sisa serbuk mesiu ditemui pada perayu untuk membuktikan bahawa beliau telah melepaskan sebarang tembakan; dan (d) PW6 tidak melihat perayu menembak si mati. Isu utama yang timbul untuk ditentukan rayuan adalah sama ada pihak pendakwaan telah membuktikan kes prima facie atas pertuduhan membunuh terhadap perayu.

Diputuskan, menolak rayuan:

(1) Mahkamah berpuas hati bahawa kes prima facie telah dibuktikan terhadap perayu. Niat atau mens rea bukanlah sesuatu yang boleh dibuktikan dengan keterangan langsung; ia adalah soal inferens. Ia boleh dikumpulkan daripada semua fakta dan keadaan yang berlaku dalam kes tersebut. Luka yang membawa maut yang dibuat di bahagian dada yang merupakan bahagian penting badan. Perayu telah menggunakan senapang patah yang merupakan senjata berbahaya, melepaskan tembakan dari jarak dekat ke bahagian penting badan. Ini adalah tindakan yang disengajakan untuk membuktikan niat yang memenuhi ujian subjektif yang diperlukan dalam s 300(c) KK. Selain itu, kematian adalah adalah akibat semula jadi yang pasti dari kecederaan yang dibuat oleh perayu. Setelah membuat dapatan kes prima facie yang dibuktikan terhadap perayu atas pertuduhan membunuh, dan memandangkan perayu telah memahami pilihan yang ada untuknya, memilih untuk berdiam diri, PK mensabitkan kesalahan dan menjatuhkan hukuman dengan betul kepada perayu (lihat perenggan 33, 35–37 & 39).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)

A *Herchun Singh & Ors v PP* [1969] 2 MLJ 209, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors [2015] 3 MLJ 105; [2015] 2 CLJ 231, CA (refd)
PP v Jufri bin Nanti [2016] MLJU 823; [2016] 1 LNS 53, CA (refd)
B *PP v Seow Wei Hoong* [2009] MLJU 1441; [2009] 1 LNS 1504, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
C *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174, FC (refd)
Virsa Singh v State of Punjab 1958 AIR 465, SC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 277
D Penal Code ss 299, 300, 300(c), 302

Appeal from: *Public Prosecutor v Eddy Anak Ganeng* [2019] MLJU 394 (High Court, Sibu)

E *Siah Sy Jen (Simon Siah, Chua and Chow Adv) for the appellant.*
Eyu Ghim Siang (Deputy Public Prosecutor, Attorney General Chambers) for the respondent.

Kamaludin Md Said JCA:

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INTRODUCTION

[1] The appellant was charged at High Court at Sibu on the 29 June 2018 under s 302 of the Penal Code for causing the death of Baring ak Birang
G (NRIC: 630216–13–5753). On the 28 May 2019, the appellant was found guilty to the charge and the learned High Court judicial commissioner (the learned JC) convicted and sentenced him to death and in accordance with s 277 of the Criminal Procedure Code, the appellant is to be hanged by neck until he is dead.

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[2] The appellant, being dissatisfied with the conviction, filed a Notice of Appeal to the Court of Appeal against the conviction.

BACKGROUND FACTS

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[3] The murder took place on 11 November 2017 at about 11pm at a hut built on a pepper field in Kapit, Sarawak. The deceased was the appellant's brother-in-law and the husband of his sister Suti ak Ganeng (PW6). At about 3am, the appellant was arrested at Kapit Police Station by PW4 and his officers

including PW11 when the appellant surrendered himself. The police seized a shotgun pellet, four live bullets and a waist pouch from the appellant. A shot gun licence was also seized by PW4 when PW6 surrendered it to the police. Other items seized were a yellow T-shirt and a red torchlight.

[4] On 15 November 2017 at about 4.15 pm, PW11 received 13 samples specimens from post mortem by Forensic Medicine Specialist (PW5). All the exhibits were sent to Chemist Department for analysis and by 29 January 2018 and 11 April 2018 respectively, PW11 received all the exhibits together with the Chemist Report from the chemists.

[5] Based on PW11's investigation, the murder incident took place when the appellant went to the deceased's house and shot the deceased. The eye witness who saw the incident was PW6. At the material time only the deceased and PW6 were at home before the appellant came and shot the deceased.

[6] The prosecution's witness, Suti ak Ganeng (PW6) testified that on 11 November 2017, her husband was shot at 11pm by the appellant while he was lying down in their hut after they had been working at their pepper field.

[7] PW5 in her post mortem report (P41) confirmed that the cause of death of the deceased was chest injury due to gunshot wound. PW5's evidence and her forensic report was not disputed.

[8] The defence's case was that it was never the evidence of the prosecution that the shotgun exh P12 (A) was the shotgun used by the appellant to shoot the deceased for reasons given as follows:

(a) the expended cartridge (P13A) tendered by the prosecution could not have been fired from the shotgun;

(b) there was no gunpowder residue and gunshot residue to implicate the appellant. Reliance was placed on chemist's report exh P11 that the chemist (PW2) did not detect elements of gunpowder residue on the single barrel shotgun, one Veno red torchlight and one specimen bag, one plastic receptable labelled Baring ak Birang and one stick of cotton swab. Reliance was also placed on the chemist (PW9) wherein in exh P10 she noted the absence of gunpowder residue on the shotgun; and

(c) PW6 testified in court that she could not see clearly the face of the shooter on the night of shooting because the lighting was dim.

[9] It was the appellant's case that based on the evidence it is not safe to find a prima facie case for the prosecution.

A FINDING AT THE CLOSE OF PROSECUTION CASE

[10] The learned JC dealt with the provisions of ss 299 and 300 of the Penal Code ('the PC') where the prosecution must prove that the deceased died as a result of gunshoot wounds inflicted on him by the appellant and the act was carried out with the intention which came within the four categories listed under s 300 of the PC that the appellant:

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(a) intended to cause the deceased's death by inflicting the gunshot wounds; or

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(b) intended to inflict the gunshot wounds which he knew would be likely to cause the deceased's death; or

(c) intended to inflict the gunshot wounds which are sufficient in the ordinary course of nature to cause the deceased's death; or

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(d) knew that his act of shooting the deceased would in all probabllity cause death or such injury is likely to cause death and he carried out the act without any justification.

E **[11]** Section 180 of the Criminal Procedure Code ('the CPC') requires that the evidence before the close of prosecution's case must be subject to a maximum evaluation (see: *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 at pp 399–400; [2006] 1 CLJ 457 at p 467 *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). The learned JC evaluated the evidence of the prosecution.

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[12] Firstly, the identity of the deceased was confirmed during the course of the trial and it is an agreed facts in statement of agreed facts (exh D). PW5's evidence on the cause of death of the deceased is also not a disputed fact.

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[13] Secondly, the evidence that the deceased, after being shot, got up and walked a few steps to the door and fell face down. By this evidence, there can hardly be any doubt that the deceased died as a result of the gunshot wounds received.

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[14] Thirdly, the learned JC accepted the identification evidence of PW6, having had the opportunity to observe her demeanour and the manner in which she testified. PW6 testified in a matter-of-factly voice, without rancour. She did not waver when cross-examined in relation to her narrative of how her brother, the appellant, shot her husband. She had heard her brother calling out for her before she opened the door of her hut. Since they are siblings, she can be expected to recognize his voice and when she opened the door of her hut and she said the appellant straight away entered the hut and short her husband. PW6 in her evidence was very sure that it was her brother ie the appellant, who

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shot the deceased despite suggestion put to her by the appellant's counsel that she could not see him in the dim light.

[15] The learned JC found there was ample evidence that the deceased was shot in the chest, as could be seen from the photographs taken at the hut. The light was not so dim that the appellant could not see the deceased lying down. The appellant would have certainly seen that he was shooting the deceased in the chest.

[16] The appellant's nocturnal visit to the deceased's hut, calling out to his sister, PW6, and shooting the deceased, according to the learned JC, were acts that taken together, speak of his intention. Further, the location of the bullet wound on the deceased's chest leaves no doubt as to the intention of the appellant. The injury was caused by the appellant with the intention of causing bodily injury and the bodily injury was sufficient, in the ordinary course of nature, to cause death. Intention may be inferred from the circumstances of the case, and how the fatal injury was inflicted (see: *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671).

[17] The learned JC was of the view that motive is not an essential element for the offence of murder, unlike intention as defined under s 300 of the PC. The law does not look for motive; it looks only to the intention (see *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed) at p 87).

[18] The direct testimony of PW6 on the shooting by the appellant, coupled with the surrender of the appellant at the Kapit Police Station, were compelling evidence. There could only be one reasonable inference that can be drawn from the act of surrendering to the police on his own volition (see: *Public Prosecutor v Jufri bin Nanti* [2016] MLJU 823; [2016] 1 LNS 53). It is the learned JC's finding that in the face of PW6's testimony, and the appellant's act of turning himself in at the Kapit Police Station (which was unchallenged in cross-examination), it does not matter whether the the appellant had switched shotguns or whether the balistic test was incorrectly carried out or whether the shotgun which was used was never recovered. In the case at hand, the charge does not refer to a specific shotgun and it was not the prosecution's case that the shotgun siezed from the appellant when he turned himself in at the Kapit Police station was the murder weapon. Further, there is no good reason to disbelieve PW6's evidence that her brother shot her husband, which evidence was supported by the appellant's surrender at the police station.

[19] On the issue that there is negative evidence to show that the gun P12A or the expended cartridge P13A was used to shoot and kill the deceased, it was the DPP's submission that it was never the case for the prosecution that the shotgun P12A is the shotgun used by the appellant to shoot the deceased.

[20] At the end of the prosecution's case, the learned JC held that the prosecution has established a prima facie case of murder against the appellant and the appellant was asked to enter his defence and was given the three options. After the three options were explained, the appellant asked to consult his lawyer. The appellant's counsel later informed that he had conferred with the appellant who understood the options available to him. The appellant elected to remain silent and not to call any witnesses, following which learned counsel for the appellant closed his case.

[21] The learned JC warned himself that there has to be re-evaluation of all evidence of the prosecution and the defence to ascertain whether the prosecution has proven its case beyond reasonable doubt, but if the accused elects not to give evidence after the court finds that there is prima facie, the court will have to convict him (see: *Public Prosecutor v Seow Wei Hoong* [2009] MLJU 1441; [2009] 1 LNS 1504). The learned JC also referred to *Balachandran v Public Prosecutor* which says that where the accused remains silent there will be no necessaity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt (see also: *Public Prosecutor v Mohd Radzi bin Abu Bakar*).

[22] The appellant had elected to remain silent despite being informed of his rights on three occasions namely on the 3 April 2019, 4 April 2019 and 28 May 2019 respectively. The learned JC was left with no choice but to convict the appellant on the charge of murder and ordered that the appellant to be hanged by the neck until he is dead.

APPELLANT'S GROUNDS OF APPEAL

[23] The appellant raised several grounds of appeal as stated in the petition of appeal. At the outset, the appellant's counsel mainly reiterated his stand made at the High Court that the death or injury of the deceased was not caused by the result of the act of the appellant for the reason that P12A was not the murder weapon, exh P13A was not the actual expended cartridge used in the shooting of the deceased and no gun shot residue (GSR) or gunpowder residue was found on the appellant to prove that he fired any gun and PW6 did not see the appellant shot the deceased.

[24] We must emphasize that the principle of law governing appeals in criminal cases on questions of fact is well established. An appellate court will not interfere unless the balance of evidence is grossly against the conviction, especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness (see: *Lai Kim*

Hon & Ors v Public Prosecutor [1981] 1 MLJ 84). In another case it was held that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see: *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79: *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209).

ISSUES AND ANALYSIS

[25] Based on the grounds and submissions made before us, the pertinent issue is whether the prosecution had proved prima facie case on the charge of murder against the appellant.

[26] The appellant's counsel submitted that the failure to identify the shotgun which killed the victim is fatal to the prosecution's case. He relied on the case of *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* [2015] 3 MLJ 105; [2015] 2 CLJ 231 which the Court of Appeal held that the pleaded case of the respondent in respect of the gun was a different serial number and the gun produced in the court was another.

[27] The submission centered arround the shotgun (exhs 12A) and expended cartridge exh P13(A) which were tendered in court but which in themselves does not prove that the shotgun was used to cause the death to the deceased. The appellant found support in the evidence of PW11 that there was no evidence of the weapon or gun which killed the victim and the evidence of chemist PW2, who testified that the expended cartridge P13(A) could not be fired using shotgun P12(A). The report from the chemist, PW2, found no gunpowder residue on the exhs P12(A), P14(A), 19P15(A), P16(A) and P19(A) and, as stated at in the witness statement WSPW-2, no elements of Gunpowder residue was detected on all exhibits. This was further corroborated by the findings of the Chemist PW9 that there is no gunshot residue (GSR) on the exhs as mentioned in her report exh P10 which, inter alia, states that she found there was no gunshot residue on the metal stub.

[28] We have read the grounds of judgment of the learned JC. He has considered this issue at paras 14 of his grounds of judgment on the submission on the negative evidence to show that the gun P12A or the expended cartridge P13A was used to shoot and kill the deceased. At para 15, the learned JC said that the defence professed to be 'dumbfounded' by the DPP's submission after the close of the prosecution's case that it was never the evidence of the prosecution that the shotgun P12A was the shotgun used by the appellant to shoot the deceased. The learned JC was inclined to think that, with the chemist report written by PW2 and PW9 (exhs P10 and P11) and extended to the defence prior to the trial, there was no element of suprise. As a standard

practice, the learned DPP tendered the shotgun, live bullets and the expended cartridge in full disclosure with the deceased's underwear, yellow t-shirt and other items which were not, and could not be said to have been used to cause the death of the deceased.

[29] At para 44, the learned JC made a finding that in this case, the charge does not refer to a specific shotgun and it was not the prosecution's case that the shotgun siezed from the appellant when he turned himself in at the Kapit Police station was the murder weapon. At para 46, the learned JC also made a finding that there was no good reason to disbelieve PW6's evidence that her brother, the appellant shot her husband, which evidence was supported by the appellant's surrender at the police station. The learned JC had also made a finding of fact that with the evidence of PW6 and the appellant's act of turning himself in at the Kapit Police Station (which was unchallenged in cross-examination), it does not matter whether the the appellant had switched shotguns or whether the balistic test was incorrectly carried out or whether the shotgun which was used was never recovered.

[30] We have given our utmost consideration on this issue related to the shotgun (exhs 12A) and expended cartridge exh P13(A) and we agree with the finding of the learned JC, and which finding we would not disturb. In any event it was never the evidence of the prosecution that the shotgun P12A is the shotgun used by the appellant to shoot the deceased.

[31] What mattered most is whether the ingredients in s 299 and 300 of the Penal Code ('the PC') have been proved by the prosecution that the deceased died as a result of gunshoot wounds inflicted on him by the appellant and the act was carried out with the necessary intention. We noted that the learned JC has expained the four categories of intention listed under s 300 of the PC.

[32] It is trite that the ingredients of the offence to be proven by the prosecution are mainly that the deceased, Baring ak Birang had died from gunshot wound, the appellant was the person who shot the deceased, the appellant had intended to inflict the gunshot wound which is sufficient in the ordinary course of nature to cause the deceased's death.

[33] Having read the entire judgment of the learned JC and with the available evidence that he has evaluated and appreciated, we are satisfied that a prima facie case was proven against the appellant.

[34] In this instant appeal, the case against the appellant rests on direct evidence. The evidence may be summarised as follows:

(a) the deceased had died on 11 November 2017 at about 11pm. The body of the deceased was identified by his son, Rentap ak Baring at the Kapit Hospital as per the post mortem report;

(b) the learned JC also accepted PW5's evidence that the deceased had died from gunshot wounds. PW5's evidence was not disputed. Be that as it may PW5 had testified that on 15 November 2017 at about 11.20am, she conducted the post mortem of the dead body of the deceased. PW5 testified that there was one entry gunshot wound on the right chest that exited on the right back of the body. PW5 concluded that the cause of death of the deceased was chest injury due to gunshot wound. This finding was reflected in her post mortem report (P41);

(c) there was direct evidence adduced by the prosecution that the appellant had caused the fatal injuries to the deceased. There was the eye witness account from PW6 who saw the appellant shoot the deceased at close range resulting in the gunshot wound at the chest of the deceased from which he died;

(d) the unchallenged evidence of PW6 that after the shooting, the appellant told PW6 that 'I go back now to report myself to the police station'; and

(e) the subsequent conduct of the appellant who had surrendered himself to the police.

[35] As correctly submitted by the DPP, intention or *mens rea* is not something capable of being established by direct evidence; it is a matter of inference. It could be gathered from all the facts and circumstances prevailing in the case (see: *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497, *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174). It has been held that once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death (see: *Virsa Singh v State of Punjab* 1958 AIR 465).

[36] It is not disputed that in the present case, the fatal wound was inflicted on the chest area which is a vital part of the body. Premised on the established facts that the appellant used a shotgun which was a lethal weapon, fired at close range at a vital part of the body. These were deliberate acts evincing an intention which satisfies the subjective test required in s 300(c) of the PC.

[37] PW5 had stated in her evidence that the injury suffered by the deceased was fatal in nature. Based on PW5's evidence, death of the deceased took place as a direct result of the appellant's act. In other words, death was an imminent

natural consequence of the injury inflicted by the appellant. The learned JC in his grounds of judgment at paras 36–38 clearly demonstrates that he had directed his mind at s 300(c) of the PC. We reproduced what the learned JC had said at para 38 in the grounds of judgment which are as follows:

> 38. The accused's nocturnal visit to the deceased's hut, calling out to his sister, PW6, and shooting the deceased, these acts, taken together, speak of his intention. The location of the bullet wound on the deceased's chest leaves no doubt about the intention of the accused, and, as submitted by the learned DPP, 'the injury (was) caused by the accused with the intention of causing bodily injury and the bodily injury is sufficient in (the) ordinary course of nature to cause death'.

[38] Based on the aforesaid reasons, it is very clear the learned JC had evaluated the evidence adduced by the prosecution in its totality and had correctly decided that the prosecution had proven a prima facie case.

[39] As indicated earlier, the learned JC called the appellant to enter his defence and explained the options available to the appellant. However, the appellant, having understood the options available to him, elected to remain silent. Having found prima facie case proven against the appellant to the charge of murder, the learned JC convicted him and ordered the appellant to be hang by the neck until he is dead.

CONCLUSION

[40] Having considered the appeal, we are unanimous in our decision that the decision of the learned JC was correct and we affirm the decision. We are satisfied that the conviction is safe. The appellant's appeal is dismissed.

Appeal dismissed; and High Court conviction affirmed.

Reported by K Selvaraju